IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 28TH JUNE 2007 / 7TH ASHADHA 1929

CRP.No. 956 of 2005()

AGAINST THE ORDER IN CMA.39/2005 of DISTRICT COURT, PATHANAMTHITTA & OS.456/2004 of M.C.,PATHANAMTHITTA

(IA 2320 2004)

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PETITIONER: APPELLANT/COUNTER PETITIONER

V.T.SAMUEL, AGED 63 YEARS,
VALIYAPARAMBIL HOUSE, MEKOZHOOR MURI,
MYLAPRA VILLAGE, KOZHENCHERY TALUK.

BY ADV. SRI.PHILIP M.VARUGHESE

RESPONDENTS/RESPONDENTS/PLAINTIFF

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1. T.S.ABRAHAM, AGED 73 YEARS,
CHALLIRICKEL HOUSE, MEKOZHOOR MURI,
MYLAPRA VILLAGE, KOZHENCHERY TALUK.

2. V.S.JOHN, AGED 74 YEARS,
VALIYAPARAMBIL HOUSE,
MEKOZHOOR MURI, MYLAPRA VILLAGE,
KOZHENCHERY TALUK.

BY ADV. SRI.LIJU.V.STEPHEN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CRP 956/2005

ORDER ON I.A.NO.2725/2005 IN CRP 956/2005

DISMISSED.

28/06/2007 SD/- (PIUS C.KURIAKOSE, JUDGE)

// TRUE COPY //

PA TO JUDGE.

jg

PIUS C. KURIAKOSE,J.

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C.R.P. No.956 of 2005

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Dated: 28th June, 2007

ORDER

The defendant counter petitioner in an application for initiation of action under Order XXXIX Rule 2A for alleged violation of an order of temporary injunction is aggrieved by the order of the learned Munsiff finding that the petitioner is guilty of disobedience of injunction order and directing his arrest and detention in civil prison and also attachment and sale of his property for payment of compensation to the respondent-plaintiff and also the judgment of the lower appellate court confirming the order of the learned Munsiff. The suit O.S.No.456 of 2004 was filed by the 1st respondent arraying the petitioner and the 2nd respondent herein as defendants for a decree of permanent prohibitory injunction restraining the defendants from trespassing upon the plaint item No.2 pathway or from reducing the same into their possession or from making obstructions to the user of the pathway by the plaintiff or from committing any act of waste upon the pathway. Along with the suit I.A.No.2030/04, an application for temporary injunction was also filed on 13.11.2004 and on the same day the learned Munsiff granted temporary injunction which was prayed for in the lines of the decree sought for in the plaint. An Advocate Commissioner was appointed ex parte on the same day on a

separate application filed by the plaintiff. The Commissioner filed report, mahazer and draft sketch on 2.12.2004. The allegation of the first respondent in the application under Order XXXIX Rule 2A was that the petitioner-1st defendant in blatant violation of the temporary injunction order obstructed the pathway by depositing heaps of jungle stones on the pathway from the western side to the eastern side and by spreading glass pieces and throwing through out the pathway. The further allegation is that the first respondent is throwing stones on the plaintiff and his workers whenever they attempt to use the pathway notwithstanding the subsistence of the order of temporary injunction. The contention raised by the petitioner in the application was that the application is not maintainable; that he has not violated the order of injunction; that plaint item No.2 is not a pathway, it is in fact a place set apart by the forefathers of the petitioner who are agriculturists in between the boundaries of their properties for the purpose of storage of granite stone pieces; the said area is even now being used for the said purpose; no pathway as alleged is in existence; the plaintiff inflicted bodily injury on the wife of the petitioner who is now admitted for treatment in the Government Hospital, Pathanamthitta; Pathanamthitta Police have registered a crime case in respect of that offence; the application under Order XXXIX Rule 2A has been filed with a view to see whether the plaintiff can escape from criminal

prosecution. The learned Munsiff deputed the Advocate Commissioner who had prepared Ext.C1 series for a further visit to the property. This time the Commissioner conducted inspection with notice to both sides and filed Exts.C2 report and C2(a) plan. The learned Munsiff considering the rival contentions and evaluating the evidence particularly the reports and plan submitted by the very same Advocate Commissioner on the basis of two inspections and the circumstances attending on the case allowed the petition under Order XXXIX Rule 2A and the District Judge as already indicated found in appeal that there is no warrant for interfering with the order of the learned Munsiff.

2. I have heard the submissions of Mr.Philip M.Varghese, learned counsel for the petitioner and also those of Mr.Liju V.Stephen, counsel for the 1st respondent-plaintiff.

3. Mr.Philip M.Varghese would submit that O.S.No.456/04 is not the only suit between the parties in respect of the suit property. The petitioner has filed another suit O.S.No.509/04 in which also an order of temporary injunction was issued against the first respondent herein. An Advocate Commissioner was appointed in O.S.No.509/04 also and he has filed a report in that suit which would show that the case of the 1st respondent regarding the pathway in question and the allegation that the order of temporary injunction in O.S.No.456/04 has been violated is untrue. The petitioner actually filed I.A.No.967/05 for calling

the Commissioner's report in O.S.No.509/04 as an item of evidence in the prosecution petition. But the learned Munsiff did not consider that I.A. at all. It is relying on an ex parte commissioner's report in O.S.No.456/04 that the learned Munsiff has passed the impugned order on the petition under Order XXXIX Rule 2A. No opportunity was given to the petitioner for cross-examining the Commissioner who prepared the two reports relied on by the learned Munsiff and the learned District Judge. The prosecution petition has been allowed in a very casual manner by the learned Munsiff without any enquiry. The impugned orders affect the liberty of the petitioner and orders which are so consequential as the impugned order should not have been passed by the courts below without testing the truth of what the Commissioner had reported and what the 1st respondent has stated in the petition by subjecting both of them to cross-examination. Learned counsel would place before me copies of the Commissioners report and plan in O.S.No.509/04. Learned counsel would fortify his submissions on the basis of various judgments of this court including the judgments in **Yohannan v. Mathai** (1991(2) KLT Sh.Notes Case No.36, P.25), **Thampi v. Malathi** (2005(4) KLT 575) (authored by myself) and that of the Supreme Court in **Vidhyadhar v. Manikrao** [(1999) 3 S.C.C. 573].

4. Learned counsel for the respondent Mr.Liju V.Stephen would

resist the submissions of Mr.Philip M.Varghese as forcefully as he could. Placing strong reliance of the judgment of this court in Nanu Ramachandran v. Raman Uthaman (1994(2) KLT Sh.Notes Case No.44, P.33 he would submit that in order to entail liability in connection with under Order XXXIX Rule 2A it is not necessary to prove formal service of the order by official route and it will suffice if the respondent had knowledge of the exact order aliunde. It is well settled that the authority and dignity of courts is to be maintained and if any party is allowed to belittle the same it will affect the rule of law and the result will be anarchy. The learned counsel took me extensively through the judgment of the Supreme Court in **Delhi Judicial Service Association, Tiz Hazari Court v. State of Gujarat** (AIR 1991 S.C. 2176) and submitted that contempt proceedings is sui generis having peculiar features which are not found in criminal proceedings. The charge of contempt is tried on summary process without any fixed procedure as the court is free to evolve its own procedure consistent with fair play and natural justice. In contempt proceedings unlike the trial for a criminal offence no oral evidence is ordinarily recorded and the usual practice is to give evidence by affidavits. This court will be sending a wrong message to violators of court orders if the impugned orders are interfered with.

5. Having considered the rival submissions addressed at

the Bar, in the light of the principles emerging from the various judicial precedence cited before me by the learned counsel, I am inclined to accept the submissions of the learned counsel for the petitioner that the trial court was not justified in allowing I.A. 2320/2004 and in directing arrest of the petitioner as well as attachment of the petitioner's property on the reason that the petitioner has violated the order of injunction passed against him and the further submission that the lower appellate court was not justified in not considering the petitioner's request for remand to the trial court. It is seen that it was mainly relying on the ex parte commissioner's report in O.S.456/04 that the learned Munsiff has passed the order which was impugned before the lower appellate court. No opportunity had been given to the petitioner for cross-examining the Commissioner who prepared the two reports, which were relied on by the learned Munsiff and the learned District Judge. The authority and the dignity of the Court is very important and nobody should be allowed to belittle the same. But personal liberty of citizens is also equally important. I feel that the petitioner should have been given an opportunity to cross-examine the Commissioner and show that what the commissioner had reported was not correct. The submissions of Shri.Philip M.Varghese have

the support of the judgment in **Yohannan** Vs. **Mathai,** reported in 1991(2) KLT SN Case No.36 P.25, and that of the Supreme Court in **Vidhyadhar** Vs. **Manikrao**, reported in 1999 (3) SCC 573. To a certain extent they have support of my own judgment in **Thampi** Vs. **Malathi,** reported in 2005 (4) KLT 575.

6. Therefore, I set aside the order passed by the trial court in I.A.No.2320/2004 and the judgment of the District Court in CMA No.39/2005 and remand I.A.No.2320/2004 to the Munsiff Court, Pathanamthitta. The learned Munsiff is directed to take decision afresh in the prosecution petition after affording an opportunity to the petitioner for substantiating his objections filed by him against the Commissioner's reports. Both the parties should be permitted to adduce whatever further evidence they have at their command. Fresh orders will be passed by the learned Munsiff at the earliest.

Transmit the records back to the court below forthwith.

(PIUS C.KURIAKOSE, JUDGE)

jg